

Neutral Confidentiality

DON ADR Program Office

NOTE: These slides are just an overview and not intended as legal advice. People seeking legal advice on specific confidentiality issues should consult an attorney.

Introduction

- The “confidential” nature of most ADR processes promotes openness and candor so that disputing parties can fully explore their settlement options.
- ADR programs often promise that their neutrals will keep the information that they receive “confidential.”
- What does “confidential” mean?
- This presentation answers this question in the context of the most frequent use of ADR, the workplace mediation.

Topics

This presentations addresses:

- The law called the ADRA of 1996
- The mediator's role as a “neutral”
- The definition of a “dispute resolution communication.”
- The basic confidentiality rule and 4 exceptions
- The DON Consent to Mediate agreement for workplace ADR

ADRA of 1996

- The Administrative Disputes Resolution Act of 1996 defines “confidentiality” for most DON ADR processes that are alternatives to administrative proceedings.
- It is the fundamental statement of the law.
- We will focus on this one.
- It provides for neutral confidentiality, but there are exceptions.

Definition of a “Neutral”

DON Certified Mediators are
“neutrals.” A neutral is ...

“... an individual who, with respect to
an issue in controversy, functions
specifically to aid the parties in
resolving the controversy.”

5 U.S.C. §571(9)

Criteria for Neutrals

5 U.S.C. §573: Neutrals

- (a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.
- (b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

Neutral Confidentiality: a 2-Part Analysis

There are **ALWAYS** two steps you must consider when analyzing ADRA confidentiality:

- 1) Is the communication a “dispute resolution communication” (“DRC”)?
- 2) It is probably confidential unless it covered by an exception to the confidentiality rule?

DRC Definition



“... any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.”

5

U.S.C. §571

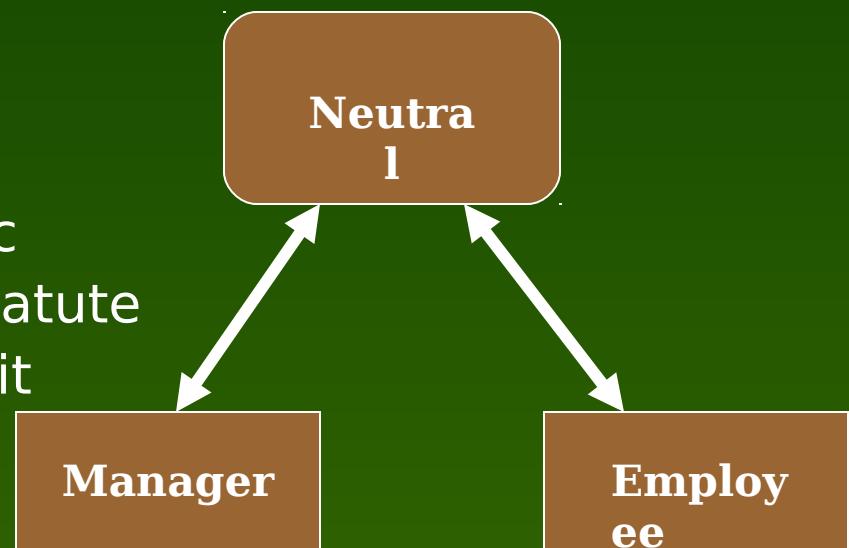
Neutral Confidentiality

The basic rule is that,

“... a neutral ... shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication provided in confidence to the neutral, unless”

Now the exceptions:

- (1) Written consent by all
- (2) The DRC is already public
- (3) Disclosure required by statute
and only neutral can do it
- (4) Court orders disclosure



The DON Consent to Mediate

DON mediations use a document called the “Consent to Mediate.” It establishes that the ADRA applies, but it does make a few exceptions to confidentiality.

The following slides show some key features of the “Consent to Mediate.”

The Consent to Mediate

*Dispute resolution communications
made under this Consent to Mediate
are confidential under the law.*

A basic statement that the
confidentiality laws apply.

The Consent to Mediate

The parties and participants, however, authorize the mediator to disclose to other parties or to nonparties any dispute resolution communication, that in the judgment of the mediator, must be disclosed to prevent or investigate fraud, waste, abuse, criminal activity or imminent physical harm.

Most mediations do not involve these issues.

The Consent to Mediate

The parties and participants, however, authorize the mediator to disclose to other parties or to nonparties any dispute resolution communication, that in the judgment of the mediator, must be disclosed to prevent or investigate fraud, waste, abuse, criminal activity or imminent physical harm.

Now we use the exception found in §574(a)(1) providing for written authorization.

Maximizing Confidentiality

EEOC imposes on neutrals the obligation to:

Ensure confidentiality, including destroying all written notes taken during the ADR proceeding or in preparation for the proceeding; ...

MD-110, IV. Neutrals, c. Role of Neutrals, 5.

Mediator Testimony?

- **EEOC, for example, can limit mediators from testifying:**
 - **“Given the confidentiality constraints imposed on neutrals under the Administrative Dispute Resolution Act, the Commission is unwilling to inquire into what transpired during the mediation process.”**
Toth v. Potter, Appeal No. 01A13335 (October 18, 2002)
 - **EEOC rejected arguments that mediator testimony would help the complainant. “...discussions ... in mediation sessions must remain confidential.”**
Makosky v. DOA, Appeal No. 01976056 (Aug 23, 2001)

Conclusion

- Federal administrative law imposes a confidentiality requirement on neutrals so that the ADR process can work.
- DON Certified Mediators follow these rules so that DON employees and managers have the best opportunity to resolve their issues using effective ADR methods.

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